

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-CON-2019/02193

In the matter between:

MUNICIPAL COUNCIL OF WINDHOEK

PLAINTIFF

and

GERNOT ALBERT BAHR

DEFENDANT

Neutral citation: *Municipal Council of Windhoek v Bahr* (HC-MD-CIV-ACT-CON-2019/02193) [2021] NAHCMD 567 (30 November 2021)

Coram: RAKOW, J

Heard: 09 November 2021

Delivered: 30 November 2021

Reasons: 03 December 2021

Flynote: Civil – Interlocutory applications – Requirement in terms of rule 32(9) and (10) restated – Amendment of pleadings – Rule 52(9) – amendments after the trial has commenced – issues to consider when allowing amendments – Prospects of success – prejudice to the respondent.

Summary: The plaintiff, the Municipal Council of Windhoek (COW) instituted action against Mr Gernot Albert Bahr in 2019. The council alleged that Mr Bahr was operating an illegal mechanical workshop on a property not zoned for the specific activity as according to the particulars of claim, the property is zoned for residential use only. Mr Bahr pleaded to these allegations. The trial commenced and during the testimony of the plaintiff's witness, an official from the council, it became apparent that the property was indeed rezoned to office zoning in 2018. It was the testimony of the witness that although the property was subsequently rezoned to office zoning, the defendant still required an additional approval falling under the class of types of consent uses.

An issue arose in that the particulars of claim referred to the conducting of a business on an erf with residential zoning and no reference was made to the fact that it was indeed rezoned to office use, which still required additional zoning for the specific type of business which the defendant conducts. An application for amendment of the particulars of claim was then moved by the plaintiff just after the testimony of its only witness. The application was vehemently opposed by the defendant. The court considered the main rules applicable to amendments.

Held that, the requirement in terms of rule 32(9) is one of meaningful engagement, not mere letter-writing.

Held that, each interlocutory application must be judged on its own merits, taking into account the overriding objectives of rules of court.

Held that, a legal practitioner can only act upon instructions received from his or her client, and therefore, the case pleaded can only be as good as the instructions received.

Held that, when a client fails to bring very important and necessary information to the attention of its legal practitioner, then the client must live with the result of such an *omissio*.

Held that, the court needs to tread judiciously when considering to allow an amendment which will most likely change the whole case to which the respondent was initially requested to answer.

Held further that, to allow an amendment mid-trial, which has the potential to change the entire case will in effect mean that the pleadings will need to be re-opened, amended pleadings, additional witness statements and expert reports will need to be filed and witnesses who have already testified would have to be recalled and this would most likely have financial implications to the litigants.

Held further that, in deciding whether or not to grant an amendment application, the court should consider the question of prejudice and to what degree the responding party might be prejudiced by the granting of an amendment to pleadings.

ORDER

1. Condonation for the late filing of the application to amend is dismissed with costs, such costs to be capped in terms of rule 39(11).
2. The wasted costs occasioned by the amendment application are awarded to the defendant.
3. The matter is postponed to 7 December 2021 at 15h30 for the fixing of dates for the continuation of the trial.

JUDGEMENT

RAKOW J:

[1] The Municipal Council of Windhoek (COW) instituted action against Mr Gernot Albert Bahr during May 2019. It was alleged that Mr Bahr was operating an illegal mechanical workshop on a property not zoned for the specific activity. Mr Bahr pleaded to these allegations and instituted a counterclaim against COW for an order directing them to within 30 days, take all steps necessary to submit the application of the defendant for the rezoning of the said erf to the Namibian Planning Advisory board (NAMPAB). The matter proceeded to trial and during the cross-examination of the only witness called on behalf of the COW, Mr Rust, it became clear that the cause of action initially pleaded can no longer stand and should be amended. Such an application was then brought on behalf of the plaintiff.

Background

[2] From the evidence lead as well as the pleadings before court, the following short history can be put together. Mr Bahr initially conducted his mechanical workshop and tyre repairs shop, Rolling Wheels for Africa CC, on premises that he shared with his uncle. His uncle sold these business premises situated at Erf 2498, Sam Nujoma Drive and early in 2016 Mr Bahr purchased Erf 2533 (Number 23 Dr Kuaima Riruako Street – or the old Bach street) and it is against the use of these premises that the complaint was raised. Mr Bahr at that time thought that the property was correctly zoned for the business he wished to conduct and proceeded to move his mechanical repair shop there. It seems that at that time, there was only an application pending for the rezoning of the property from residential use to office use.

[3] Mr Rust testified that they received a complaint from the neighbours residing next to the property who complained about the noise being emitted by the mechanical workshop and the tyre repair shop. Upon receipt of the complaints the COW sent investigators out to the erf on 26 October 2016 and again on 16 June 2017 who reported that it was indeed the case, a mechanical workshop was operating from the premises, and tyres were being sold from the same premises. The erf was to be used only for residential premises at that time and not for the purposes the defendant was using it for. The defendant was then informed in writing of the fact that he did not have approval from COW to operate a business from the said premises and he further did not have the necessary planning permission for

erecting some of the structures found on the premises. This correspondence was dated 26 June 2017.

[4] In a letter dated 30 January 2018, the COW informed the defendant that the proposed rezoning of Erf 2533 from residential with a density of 1:900m to office with a bulk of 0,4 was approved for submission to NAMPAB subject to two conditions, one being that the betterment fees are paid and a non-related issue regarding encroachment which had to be resolved. Subsequently, this issue was resolved and the betterment fees were paid by the defendant. This according to Mr Rust was enough to allow the plaintiff now to use the premises for purposes as per the zoning allocated to offices. During cross-examination, he explained that the amendment scheme was indeed approved by NAMPAB during a meeting of 28 May 2020 and as such published in the Government Gazette of 31 July 2020 number 7290, notice number 173/2020. The problem, as explained by him is not that the premises were zoned as residential at the time when the defendant used it as a mechanical repairs shop but that even though the erf now has office zoning, it is still not correct because it needed an additional approval falling under the class of types of consent uses.

[5] The problem now arose that the particulars of claim referred to the conducting of a business on an erf with residential zoning and no reference is made to the fact that it was indeed rezoned to office use, which was still not the correct zoning for conducting the defendant's business in its current format. This resulted in Ms Angula, on behalf of the plaintiff, bringing an application to amend the particulars of claim, which application was opposed by the defendant.

The Particulars of claim:

[6] The particulars of claim make the necessary averments regarding the parties and jurisdiction and then continues as follows:

- '4. On or about 27 October 2016, the Plaintiff discovered that the Defendant was operating an illegal mechanical workshop (hereinafter referred to as the "workshop") from a (sic) four large containers selling tyres on erf 2533, Bach Street, Windhoek, Republic of Namibia. The Plaintiff issued a notice to the

Defendant to cease the illegal activities on the aforesaid erf being carried out without the required consent from the Plaintiff.

5. On or about 14 June 2017 and upon receipt of complaints that the workshop is still operational, the Plaintiff undertook to carry out a site inspection on the erf and confirmed that the workshop is still operational.
6. The aforementioned erf 2533, Bach Street is zoned as a residential area and falls within the Windhoek Town Planning Scheme and is subject to section 48 of the Town Planning Ordinance 18 of 1954 and section 11 of the Town Planning Amendment Act 27 of 1993. The Defendant's workshop on a residential erf without the required consent from the Plaintiff is unlawful and constitutes criminal conduct.
7. On or about 16 June 2017, a further notice to cease illegal activities was issued summons constituting demand, (sic) the Defendant continues to illegally operate a workshop in the residential area, causing nuisance and undesirability, Defendant refused, failed, and or neglected to stop operating the workshop. A copy of the notice is attached hereto marked "A".
8. In the premise, the Defendant is liable to cease its illegal activities on erf 2533, Bach Street, Windhoek.

WHEREFORE PLAINTIFF CLAIMS AGAINST THE DEFENDANT:

1. Declaring that the Defendant's conduct to operate a workshop selling tyres on erf 2533, Bach Street, Windhoek, the Republic of Namibia without such erf being rezoned by the Plaintiff and without the plaintiff's consent as unlawful.
2. Interdicting the Defendant from continuing to operate a workshop on erf 2533, Bach Street, Windhoek in the Republic of Namibia for as long as there (sic) aforesaid erf 2533 remains zoned as "residential".
3. (was abandoned)
4. Cost of suit
5. Further and/or alternative relief.'

[7] The plaintiff's rule 52(1) notice indicated the amendments which they wish to affect to their particulars of claim as follows:

1. By inserting the following words in paragraph 6 immediately after the word “residential” as follows:

“6. And subsequently zoned as a(n) office area”.

2. By inserting the following words in paragraph 6 in the fifth line immediately after the word “residential erf” as follows:

“6. Which was subsequently zoned as an office erf”.

As such paragraph 6 of the plaintiff’s particulars of claim should they be amended should read as follows:

“the aforementioned erf 2533, Bach Street, is zoned as a residential area and subsequently zoned as an office area and falls within the Windhoek Town Planning Scheme and is subject to section 48 of the Town Planning ordinance 18 of 1954 and section 11 of the Town Planning Amendment Act 27 of 1993. The Defendant’s workshop on a residential erf which was subsequently zoned to an office erf, without the required consent from the Plaintiff is unlawful and constitutes criminal conduct.”

3. By deleting the word “area” after residential in paragraph 7 and replacing it with the word “Erf”.
4. By inserting the following words in paragraph 7 immediately after the word “erf” as follows:

“7. Which was subsequently zoned as an office erf”.

As such paragraph 7 of the plaintiff’s particulars of claim should they be amended should read as follows:

“On or about 16 June 2017, a further notice to cease illegal activities was issued summons constituting demand, the Defendant continues to illegally operate a workshop in the residential erf which was subsequently zoned to an office erf, causing nuisance and undesirability, Defendant refused, failed and or neglected to stop operating the workshop.”

5. By deleting the word “residential” in prayer 2 and replacing it with the word “office”.

“As such prayer 2 of the plaintiff’s particulars of claim should it be amended should read as follows:

- “2. Interdicting the Defendant from continuing to operate a workshop on erf 2533, Bach Street, Windhoek, Republic of Namibia for as long as the aforesaid erf remains zoned as office.”

[8] This proposed amendment was objected to by the defendant and the court proceeded to hear arguments in the interlocutory application.

Compliance with rule 32(9) and 32(10)

[9] The respondent contended that there was no concerted effort by the applicant to engage to try and attain an amicable resolution in respect of the interlocutory application. The requirement in terms of rule 32(9) is one of meaningful engagement, not mere letter-writing. The respondent then proceeds and refers the court to the matter of *Bank Windhoek Limited v Benlin Investment CC*¹ where Masuku J pointed out that a mere letter written to ask how a defendant intends to resolve a matter cannot begin to satisfy the requirement of an engagement as envisaged by rule 32(9). Parties will further not be allowed to merely go through the motions and as such, the plaintiff did not attempt to amicably resolve the matter and at no stage considered the issues raised in the defendant's rule 32(9) reply. No certificate in terms of rule 32(10) was filed before proceeding with the interlocutory proceedings.

[10] The applicant referred the court also to the matter of *Bank Windhoek Limited v Benlin Investment CC*², specifically where Justice Masuku discussed the purpose of rules 32(9) and 32(10) in supporting the judicial case management system. He stated:

¹ *Bank Windhoek Limited v Benlin Investment CC* [2017] NAHMD 78 (15 March 2017).

² *Supra*.

'It must be mentioned and pertinently so, that rule 32 (9) and (10) are not merely incidental rules. They go to the core of the edifice that should keep judicial case management standing tall and strong. The two sub-rules fully resonate with and give live expression to the overriding and core values of judicial case management as found in rule 1(3) and stated in the following terms:

'The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost-effectively as far as practicable by –

*

(b) saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary to achieve a fair and timely disposal of a cause or matter;

*

(f) considering the public interest in limiting issues in dispute and the early settlement of disputes by agreement between the parties in dispute.'

*

[11] It is the opinion of this court that each interlocutory application must be judged on its terms and that the overriding objective of rules must be borne in mind. The applicant indicated that she intended to bring the said application from the bar, as is possible but the court then directed the matter to be dealt with formally. The respondent addressed the court already when the initial indication was given that the application to amend the particulars of claim will be brought and indicated their strong opposition to such an application at that time. This was already the beginning of a process of engagement between the parties. It is not clear how else the applicant should have dealt with the bringing of the application, other than to bring it in the way it was brought. The objections raised by the respondent remained the same and will be dealt with later in this judgement. The court, therefore, finds that it is satisfied that some engagement did take place and in this instance cannot see how an additional engagement and meeting could have changed the outcome of the engagement, also taken into account the limited time the court allowed for such engagement.

Application for condonation for the late filing of the amendment application

[12] The applicant filed the application to amend one day after 28 October 2021, the date set for such filing by the court. The applicant's legal practitioner explained the delay in that she could not attend to the application on 28 October 2021 as her son injured himself and she had to attend to him and he accordingly had to receive medical help. She therefore could not consult and conclude the affidavit supporting the application on time. She did however file an application for condonation together with the amendment application and submitted that no prejudice was suffered by the plaintiff due to the late filing of the application to amend.

[13] The respondent opposed the application for condonation and submitted that it should be refused. It was submitted that the supporting affidavit filed did not at all deal with the prospects of success, which is one of the two requirements that applications for condonation must deal with. It was further submitted that the defendant's prejudice, while already facing a very belated amendment application, is exacerbated through another condonation application.

[14] Applications for condonation are not a mere formality and will not be had for the asking and the party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the granting of condonation. There must be good cause shown why condonation must be granted. The term 'good cause' was considered in *Balzer v Vries*³ where the Supreme Court pronounced itself on this matter as follows:

[20] It is well settled that an application for condonation is required to meet the two requisites of good cause before he or she can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success on appeal.' (Emphasis added).

[15] It has become trite that the following principles, as set out in *Telecom Namibia Limited v Michael Nangolo and Others*⁴, by Damaseb JP guides applications for condonation:

³ *Balzer v Vries* 2015 (2) NR 547 (SC) at 661 J – 552 F.

⁴ *Telecom Namibia Ltd v Nangolo and Others* (case No LC 33/2009, Damaseb JP, 28 May 2012).

- '1 It is not a mere formality and will not be had for the asking. The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.
2. There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.
3. It must be sought as soon as the non-compliance has come to the fore. An application for condonation must be made without delay.
4. The degree of delay is a relevant consideration.
5. The entire period during which the delay had occurred and continued must be fully explained.
6. There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented. (Legal practitioners are expected to familiarize themselves with the rules of court.)
7. The applicant for condonation must demonstrate good prospects of success on the merits. But where the non-compliance with the rules of court is flagrant and gross, prospects of success are not decisive.
8. The applicant's prospect of success is in general an important though not a decisive consideration. In the case of *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others*, Hoexter JA pointed out at 789I-J that the factor of prospects of success on appeal in an application for condonation for the late notice of appeal can never, standing alone, be conclusive, but the cumulative effect of all the factors, including the explanation tendered for non-compliance with rules, should be considered.
9. If there are no prospects of success, there is no point in granting condonation.'

[16] I will therefore deal with the prospects of success of the application to amend.

The arguments on the application to amend

[17] For the plaintiff it was argued that Mr Rust testified that the defendant's application to rezone the premises at Erf 2533, Bach Street, Windhoek, Republic of Namibia, was approved and it was accordingly successfully rezoned to office, however, the activities that the defendant was conducting on the now newly zoned office premises were still illegal as they were not in line with the acceptable activities listed under office zoned premises. It was explained that during consultation with Mr Rust, as it related to the preparation of the trial, instructions were not received as to whether the property was already zoned for office as applied for in 2015 by the erstwhile owners.

[18] It is argued that when dealing with amendment applications, the court needs to determine the prejudice which will be suffered by the other party, should such an amendment be granted. Regarding the specific objections which were raised by the defendant, it was argued that it is not correct that the amendment application was brought at an advance stage of the proceedings as only the witness of the plaintiff had testified and as per the rule, such an application can be brought any time before judgement. It was further argued that it can then be assumed that it is a common cause fact that Erf 2533 is accordingly zoned as office and no dispute arises as it relates to this particular Erf if the amendment is passed that would cause irreparable prejudice to the defendant and his right to a fair trial which would in turn not be in the best interests of the administration of justice.

[19] It was further submitted that the plaintiff tendered wasted costs for the costs that will be incurred by the amendment and therefore the defendant will suffer no prejudice in this regard. The legal representative for the plaintiff further argued that as there is no dispute that Erf 2533 has now been rezoned the need for pleadings to be revisited may not be necessary. Further, the defendant fails to advise what would be the result of the revisiting and fails to advise if in fact, it would be necessary.

[20] On behalf of the defendant, it was argued that the proposed amendments are belated and brought at an advanced stage of the trial proceedings and after the plaintiff's only witness testified, therefore, basically at the end of the plaintiff's case. If the amendment is allowed, it would further cause irreparable prejudice to the defendant and his right to a fair trial which is not in the interest of the administration of justice. In essence, the proposed amendments amount to an attempt by the

plaintiff to impermissibly introduce a new cause of action by effectively abandoning its claim and now introducing a new claim, which was never previously pleaded.

[21] It was also submitted that the proposed amendments introduce a complete change of stance by the plaintiff in several respects, which would require the parties to revisit pertinent aspects of the matter through pleadings, discovery, witness statements (including further expert witnesses), recalling of the plaintiff's witness for cross-examination on the new issues and at a significant cost and causing a significant time delay. The matter must basically start from afresh. The plaintiff further fails to offer any explanation for the lateness of the amendment. The plaintiff pleaded on the counterclaim, drafted the witness statement of her witness, participated in the drafting of the pre-trial report which was subsequently made an order of court, consulted with her witness before trial, and did not once realize that their claim is defective. She only did so when it became clear during cross-examination.

Legal considerations for granting applications for amendment

[22] The amendment of pleadings is regulated by rule 52 of the Rules of Court and with specific reference to rule 52(9), which provides as follows:

'52(9): The court may during the hearing at any stage before judgment, grant leave to amend a pleading or document on such terms as to costs or otherwise as the court considers suitable or proper.'

[23] The principles regulating the granting of a proposed amendment of a pleading are very clear and were summarized in a Supreme Court judgment of *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek*⁵ as follows:

'[38] The established principle that relates to amendments of pleadings is that they should be "allowed to obtain a proper ventilation of the dispute between the parties ... so that justice may be done", subject of course to the principle that the opposing party should not be prejudiced by the amendment if that prejudice cannot be cured by an appropriate costs order, and where necessary, a postponement'

⁵ *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek* (SA 33-2010) [2013] NASC 11 (19 August 2013).

[24] A further elaboration on these principles can be found in the matter of *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*⁶ wherein it was held that:

[55] Regardless of the stage of the proceedings where it is brought, the following general principles must guide the amendment of pleadings: Although the court has a discretion to allow or refuse an amendment, the discretion must be exercised judicially . . . The overriding consideration is that the parties, in an adversarial system of justice, decide what their case is; and that includes changing a pleading previously filed to correct what it feels is a mistake made in its pleadings . . . A litigant seeking the amendment is craving an indulgence and therefore must offer some explanation for why the amendment is sought . . . A court cannot compel a party to stick to a version either of fact or law that it says no longer represent its stance. That is so because a litigant must be allowed in our adversarial system to ventilate what they believe to be the real issue(s) between them and the other side.'

[25] When deciding whether or not to grant an amendment application, it is of utmost importance for the court to decide on the question of prejudice and to what degree the responding party might be prejudiced by the granting of an amendment to pleadings. In *South Bakels (Pty) Ltd and Another v Quality Products and Another*⁷ *Manyarara AJ* stated that:

'It will normally not be granted if there will be prejudice to the other party which cannot be cured by an order for costs or a postponement. Prejudice in this context is not limited to factors which affect the pending litigation but embraces prejudice to the rights of a party in regard to the subject-matter of the litigation. . . There will not be prejudice if the parties can be put back for the purpose of justice in the same position as they were when the pleading which is sought to be amended, was originally filed. The onus rests upon the applicant seeking the amendment to show that the other party will not be prejudiced by the amendment.'

⁶ *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).

⁷ *South Bakels (Pty) Ltd and Another v Quality Products and Another* 2008 (2) NR 419 (HC) at page 421 paragraph 10.

[26] The following was also said in the *I A Bell*⁸ matter regarding the strength of the explanation that needs to be provided if a change of front is introduced by a requested amendment. It was said that:

'A reasonably satisfactory explanation for a proposed amendment is strongest where it is brought late in proceedings and/or where it involves a change of front or withdrawal of a material admission. In the latter instance, tendering wasted costs or the possibility of a postponement to cure prejudice is not enough'

[27] The explanation by the plaintiff's legal practitioner for not noticing the change in circumstances, which directly impacted on its particulars of claim, is that the legal practitioner was never informed of these changes. In *I A Bell*⁹, the court stated as follows:

'[58] A legal practitioner is an agent of the client. The source of his or her authority and mandate is the client. It is for that reason assumed that when a legal practitioner files a pleading or makes undertakings to the court, he or she has the necessary authority and mandate to do so. If that were not so, our litigation process will be afflicted by uncertainty. The legal practitioner, therefore, has a special duty to make sure that his or her conduct of the client's case accords with instructions. It is a breach of an ethical duty not to do so and the surest way of making sure that does not happen is to take a detailed statement from the client at the first consultation; meet the client again to take instructions in relation to pleadings of substance received from the opponent; confirm with the client admissions and denials made in either pleadings or case management reports, especially the pre-trial report which binds the parties to admissions and denials made for the purpose of trial.'

[28] What further needs to be considered in relation to the principles applicable in considering amendment application, is the extensive quote from the Supreme Court case of *Municipal Council of Windhoek v Pioneerspark Dam Investment CC*¹⁰:

⁸ Supra

⁹ Supra.

¹⁰ *Municipal Council of Windhoek v Pioneerspark Dam Investments CC* [2018] NASC 394.

[35] What has however changed since the advent of JCM is that the previously liberal attitude to granting amendments has been found by a Full Bench of the High Court in *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* to no longer apply because it is inimical to the ethos of JCM, with the emphasis shifting from 'doing substantial justice between parties' to the 'interests of the administration of justice overall' – of which doing justice between the parties is but one consideration. We endorse this approach except to add that 'doing substantial justice between the parties' although no longer being the primary consideration, remains of considerable importance but is now to be considered within the context of the objectives of JCM, with late amendments being subjected to greater scrutiny than before because of their deleterious effect upon the administration of justice.'

[29] The Judge President, writing for the Full Court in *I A Bell*, reached this conclusion after considering recent decisions of the High Court on the issue since the introduction of JCM in Namibia in 2011 and after an exhaustive survey of the approach followed in Australia after that jurisdiction introduced JCM. The Full Court stressed that a new approach to amendments under JCM was underpinned by the following overriding objectives of JCM:

- (a) to ensure the speedy disposal of any action or application,
- (b) to promote the prompt and economic disposal of any action or application,
- (c) to use efficiently the available judicial, legal and administrative resources,
- (d) to identify issues in dispute at an early stage,
- (e) to curtail proceedings, and
- (f) to reduce the delay and expense of interlocutory processes. Rule 1B imposed an obligation on the parties 'to assist the managing judge in curtailing the proceedings.'

[30] The Full Court in *I A Bell* provided detailed guiding principles applicable to the amendment of pleadings under JCM which are neatly summarised by the Judge-President in his recent work *Court Management Civil Procedure of the High Court of Namibia: Law, Procedure and Practice*. Relevant for present purposes are the following:

- Although the court has discretion to allow or refuse an amendment, the discretion must be exercised judicially.

- An amendment may be brought at any stage of a proceeding. The overriding consideration is that the parties, in an adversarial system of justice, decide what their case is; and that includes changing a pleading previously filed to correct what it feels is a mistake made in its pleadings.
- A litigant seeking an amendment is craving an indulgence and therefore must offer some explanation for why the amendment is sought.
- The case for an explanation of why the amendment is sought and the form it will take will also be determined by the nature of the amendment: whether or not an explanation under oath would be required will thus depend on the circumstances of each case; the more substantial an amendment, the more compelling the case for an explanation under oath. Correcting a typographical error would thus not require an explanation under oath.
- (The need for) a reasonably satisfactory explanation for a proposed amendment is strongest where it is brought late in proceedings and or where it involves a change of front or withdrawal of a material admission. In the latter instance, tendering wasted costs or the possibility of a postponement to cure prejudice is not enough. The interests of the administration of justice require that trials proceed on dates assigned for the hearing of a matter.'

[31] The Full Court in *I A Bell* further held that if a party has failed to provide an explanation on oath or otherwise in circumstances where one was called for, the proposed amendment should be disallowed.

[32] The Judge-President in *I A Bell* stressed that amendments should less readily arise following the introduction of JCM:

'The system of judicial case management in which practitioners are by law required from an early stage in the life of a case to limit issues and identify the real issues for determination by the court has the undoubted merit, and therefore imposes the duty on the practitioner, to consult early, thoroughly and to obtain all relevant evidence from the client. That must, of necessity, limit the number of mistakes by counsel on account of not properly understanding a client's version. It is that logic that informs the ratio in *Scania Finance Southern Africa (Pty) Ltd v Aggressive Transport CC* and *Jin Casings & Tyre Supplies CC v Hambabi*.'

[33] In considering an explanation for an amendment, a court would in our view, in addition to the guiding principles enumerated by the court in *I A Bell*, require that an applicant establish that it did not unduly delay its notice to amend after becoming aware of the evidentiary material upon which it proposes to rely. The applicant would also need to show, as was stressed in *Scania* that the proposed amendment raises a triable issue, which is a dispute which, if established on evidence foreshadowed by the proposed amendment, will be viable or relevant. Following the advent of JCM, where an amendment is sought at a late stage of proceedings, an applicant should also be required to indicate how it proposes to establish its amended case and its prospects of succeeding with the new cause would properly be elements in the exercise of the court's discretion, as was expressed in *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd & another* where the court concluded, (as is accurately translated in the headnote):

'The greater the disruption caused by an amendment, the greater the indulgence sought and, accordingly, the burden upon the applicant to convince the Court to accommodate (it).'

Conclusion

[34] The applicant/plaintiff in this matter seeks an amendment which in essence, if allowed will change the whole front in the case. The case that the defendant had to meet, was always that he was conducting a mechanical workshop on premises zoned as residential. The reason seemingly for instituting proceedings on the wrong premise seems to be the fact that the legal practitioner was never informed of the correct position, in that as far back as January 2018, the plaintiff granted its approval for the rezoning of the property from residential to office. This was indeed almost a year before the summons in this matter were issued.

[35] During the conducting of the JCM process, the drafting of the plea of the plaintiff on the counterclaim, the discovery of documents, including the letter of January 2018 from the plaintiff, the drafting of witness statements, and the drafting of the pre-trial report which must set out the issues in dispute, the fact that the property was rezoned from residential to office never came up. In explaining the failure to

bring an amendment application earlier, Mr Mutjiwa George Mayumbelo, the Acting Chief Executive officer for the City of Windhoek says the following:

'During consultation with Mr Rust as it related to the preparation of the trial instructions were not received as it relates to whether the property was in fact already zoned for office as applied for in 2015 by the erstwhile owners. This fact may have been omitted all through the conduct of the matter as parties may had the mistaken belief that the legal practitioner for the applicant was in fact aware that the application for the office rezoning was in fact approved.

Even during the mediation proceedings what this fact never addressed that Erf 2533 was rezoned to office in 2019 already. This may have been as a result of miscommunication or the mistaken belief that the legal practitioner for the applicant was aware of this when in fact she was not.'

[36] There is no affidavit filed from Mr Rust as to why he never mentioned the rezoning of the property to the plaintiff's legal representative and the reasons put forward by the Acting CEO of the plaintiff for the failure are not clear and seems flimsy at most. It is further so that the legal practitioner can only act upon instructions received from her clients and as a result, the case put forward can only be as good as the instructions received. If a client fails to bring very important and necessary information to the attention of its legal practitioner, then the client must live with the result of such an *omissio*.

[37] It is further of utmost importance that the real issues are determined in trial proceedings. In the current case, those issues seem not to be before the court and the applicant is now seeking permission to introduce these by the said amendment. However, allowing such an amendment will change the whole case that the respondent was initially requested to answer upon. Pleadings, including a counterclaim, witness statements, and expert witness reports were prepared to answer on a specific scenario as set out in the particulars of claim of the plaintiff. To allow the requested amendment will in effect mean that the pleadings will need to be re-opened, additional witness statements and expert reports need to be filed and the recall of the witness that has already testified in these proceedings. This is surely prejudicial to the respondent. It will be a costly exercise and time-consuming as the pre-trial process will essentially restart from the plea faze.

[38] I, therefore, find that there are no prospects of success for the application to amend the particulars of claim of the plaintiff and therefore the application for condonation for the late filing of the application to amend is dismissed.

[39] I further indicated to the parties that I expect them to address me on the wasted costs which were incurred with the filing of the application for amendment, resulting in the remainder of the week for which the trial was set down, to not be utilized. Taking into account what was discussed above about the lack of care on the side of the plaintiff when communicating its instructions to the drafting of the particulars of claim, the plea to the counterclaim, the witness statements as well as during consultation with the witness, the court believes that the applicant must also be visited with the wasted costs necessitated by the bringing of the application.

[40] For the above reasons I make the following order:

1. Condonation for the late filing of the application to amend is dismissed with costs, such costs to be capped in terms of rule 39(11).
2. The wasted costs occasioned by the amendment application are awarded to the defendant.
3. The matter is postponed to 7 December 2021 at 15h30 for the fixing of dates for the continuation of the trial.

E RAKOW
Judge

APPEARANCES:

PLAINTIFF:

M ANGULA
Of AngulaCo. Inc., Windhoek

DEFENDANTS:

M BOONZAIER
Instructed by Engling, Stritter & Partners,
Windhoek